

## ***ACQUISITION REFORM TRAINING MODULE***

### ***Implementing Cost/Price & Past Performance Changes***

#### **- New Rules in Cost & Price Analysis**

- New Rules in Cost & Price Analysis Exercise
- Past Performance Data - Evaluation and Recording
- Past Performance Data - Evaluation and Recording Exercise

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New Rules in Cost & Price Analysis

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Welcome to New Rules in Cost & Price Analysis. This lecture is followed by an exercise on the New Rules in Cost and Price Analysis.

During the lecture, I will discuss the changes to the Truth in Negotiations Act (TINA) as they appear in the FAR rule. The new rule will require you to refocus your skills on gathering information and determining price reasonableness. You will also develop new skills in using the commercial exception. Next, you will move into groups and work through a series of short cases which illustrate the new rules. As a result, you should be familiar with the impacts of acquisition reform on TINA and be able to identify TINA exceptions to the requirement for cost or pricing data. The new rule supports the guiding principles of waiving or seeking relief from low value added directives and giving priority to customary commercial practices.

The rule empowers contracting officers by giving them the ability to obtain information to get fair and reasonable prices without the “baggage” associated with cost or pricing data; e.g., certifications and defective pricing. The new TINA rule changes the focus from “after the fact” to doing the job right up front.



Major changes are found in the new FAR coverage on the Truth in Negotiations Act which empower contracting officers and are based on specific requirements of law and philosophical interpretation of what the law had in mind. Contracting officers still have a fundamental obligation to determine price reasonableness.

FAR policy shifts with respect to determining price reasonableness. A hierarchical policy preference for the types of information used in assessing price reasonableness is established. The policy **(15.804-5)** states that generally no additional information should be obtained from the contractor if there is adequate price competition. This is followed by progressively more intrusive types of data requirements.

TINA says that you cannot get cost or pricing data if an exception applies.

The rule adds a commercial item exception.

The rule applies without regard to contract type.

The rule establishes a bright line between cost or pricing data and all other information.

## Information Preferences



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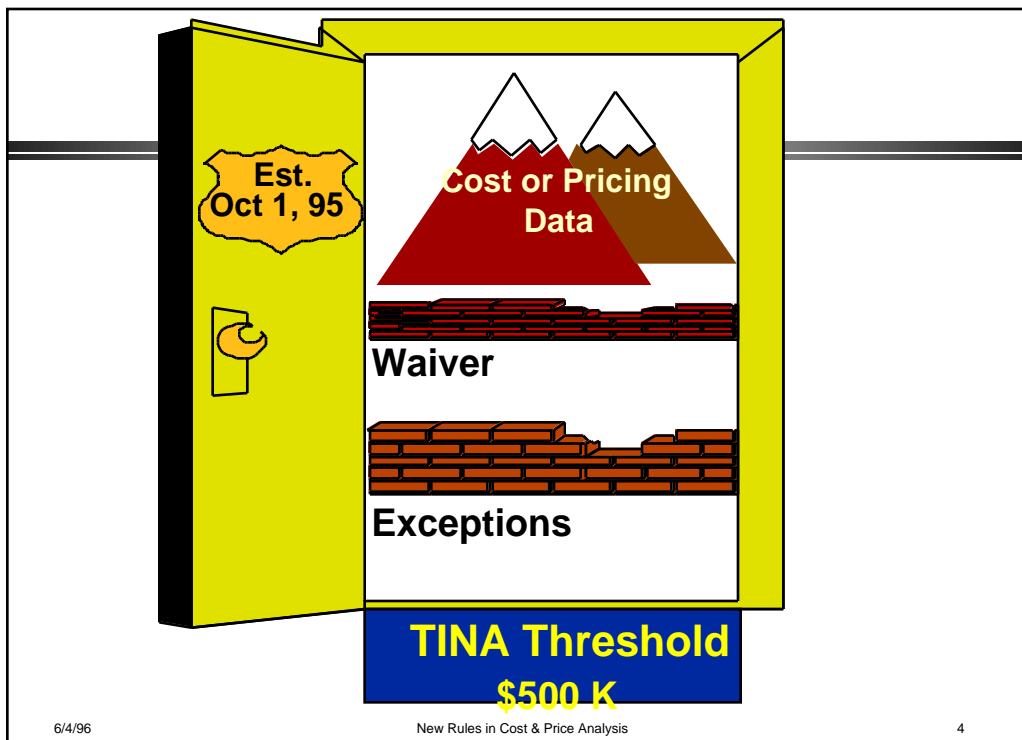
New Rules in Cost & Price Analysis

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**(15.802)** Contracting officers shall purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer shall not obtain more information than is necessary.

Cost or pricing data will be the data of last resort rather than the data of first resort in cost and price analysis. In fact, contracting officers are prohibited from obtaining cost or pricing data if an exception applies. FASA (**Sect 1203**) deleted the authority previously in TINA to override these exceptions.

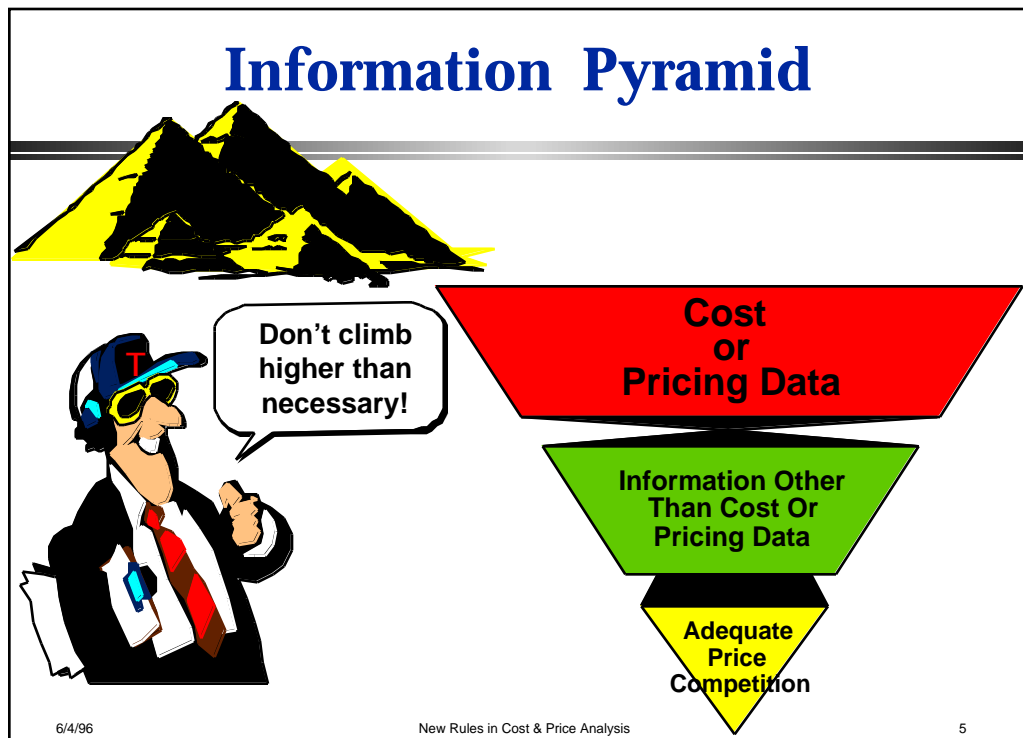
Even if an exception does not apply, the FAR encourages a waiver if price reasonableness can be determined without cost or pricing data. Let's find out why...



**(15.804-2)** Looking at the chart, you can see mountains in the distance which signify the huge volume of paper and resource costs to furnish cost or pricing data. With this in mind, contracting officers should go through a thought process to consider:

- Whether the price is expected to exceed the threshold.
- If one of the exceptions apply. (Exceptions have changed under FASA.)
- Is a waiver appropriate? (Waiver procedures have also changed.)

As a last resort, require cost or pricing data.



Because data costs money, how do you go about determining price reasonableness? **(15.802)** This is the “price reasonableness information pyramid.” The pyramid reflects the FAR’s new order of priority to support an analysis of price reasonableness. It’s inverted because as you climb, the volume of information increases. Don’t climb any higher than necessary to determine price reasonableness. There are three generally accepted levels:

- 1 Adequate price competition. As a general rule, no further information from the offeror is required if the price is based on adequate price competition. I’ll discuss adequate price competition further as a TINA exception.
- 2 Information other than cost or pricing data. This is a new term which I’ll address on the next chart.
- 3 As a last resort, obtain cost or pricing data. I’ll speak more about this later.

## Information other than Cost or Pricing data



**Contractor's format**  
**Not certified**  
**Limit information**  
**Price Reasonableness**  
**Cost Realism**

**“Bright Line” distinction**



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**(15.801)** Information other than cost or pricing data means any type of information that is not required to be certified but is necessary to determine price reasonableness or cost realism. Such information may include pricing, sales, or cost information as well as cost or pricing data for which certification is deemed inapplicable after submission.

A “bright line” can be drawn between “Cost or Pricing Data” that is certified and may be used for defective pricing purposes and all other information.

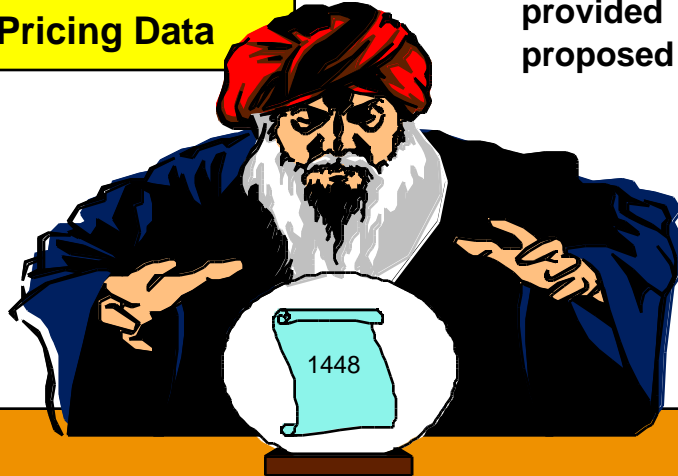
**(15.804-5(a)(2))** The contracting officer may require submission of information other than cost or pricing data to determine price reasonableness or cost realism. The contractor's format should be used for submitting the data. The data shall not be certified.

The contracting officer should request price-related information from sources other than offerors, relying first on information available within the Government, and second on information from sources other than the offeror. Finally, price information from the offeror and cost information which doesn't meet the FAR definition of “cost or pricing data” can be considered as a last resort.

## Proposal Cover Sheet SF 1448

**Table 15-3: Submitting  
Information Other than  
Cost or Pricing Data**

**Offeror's format  
Relate information  
provided to price  
proposed**



The new form, Standard Form 1448, is used to submit information other than cost or pricing data. (A copy is provided as a handout at the end of your lecture packet). FAR Table 15-3 contains instructions for submission of information other than cost or pricing data.

The information shall be at the level described in the solicitation or specified by the CO. The offeror's format is acceptable unless the CO determines that use of a specific format is essential.

If adequate price competition is expected, the information may include cost or technical data necessary to determine the cost realism and adequacy of the proposal, e.g., information to validate that the proposed costs are consistent with the technical proposal or cost breakdowns to help identify unrealistically priced proposals.

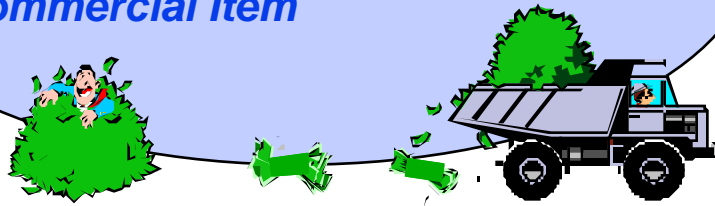
If the offer is expected to be below the threshold and adequate price competition is not expected, the information shall consist of data to permit the CO to determine price reasonableness including information on prices and quantities at which the offeror has previously sold the same or similar item.

The use of this form provides for pre-award audit rights (a convenient way for the Government to evaluate an offeror's proposal).

**(15.804-5(a)(3))** Information must support the proposed price. Include sufficient detail or cross references to establish the relationship of the information provided to the price proposed.

## Exceptions to Cost or Pricing Data

- **Adequate Price Competition**
- **Established Catalog or Market Price**
- **Price set by law or regulation**
- **Commercial Item**



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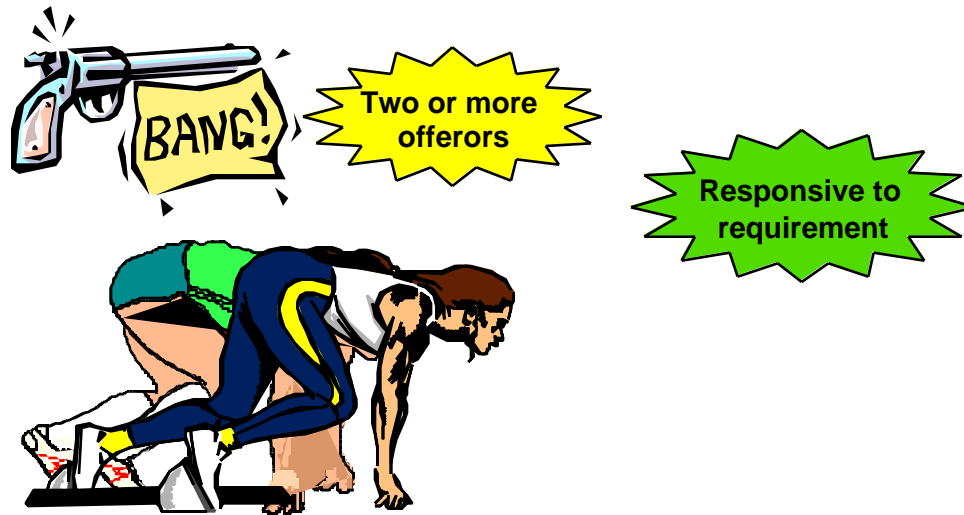
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These are the exceptions to cost or pricing data. They will be discussed on the next several slides.

Caution! - Once you decide that an exception applies, you can't change your mind. Don't grant the exception until you are certain you have a fair and reasonable price.



# Adequate Price Competition



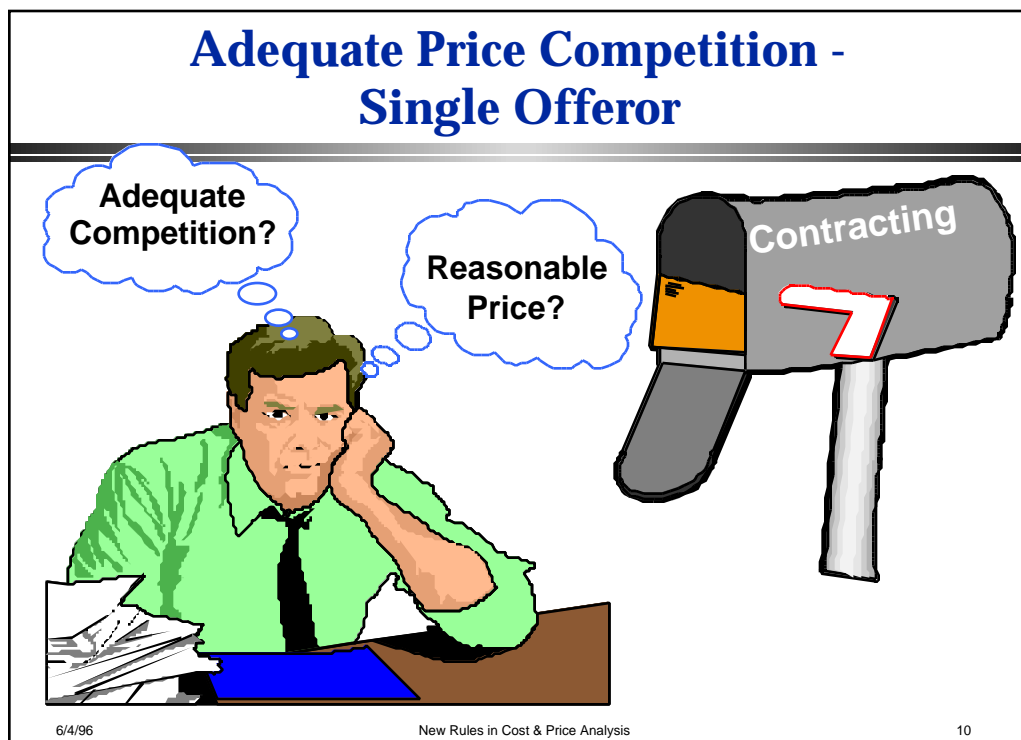
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**(15.804-1(b))** The first exception we will discuss is adequate price competition.

One instance is when two or more responsible offerors, competing independently, submit priced offers responsive to the Government's expressed requirement. The new rule **(15.804-1(b)(1))** incorporates the principle established by the Comptroller General that adequate price competition can be based on "greatest value" as long as price is a "substantial factor." Greatest value may be stated in a solicitation in terms of evaluation factors such as performance, risk management, and cost or price. What is substantial? It's a matter of judgment. The question is whether price was enough of a factor to cause offerors to "sharpen their pencils" in pricing their approach to the work.



There is a reasonable expectation, based on market research or other assessment, that two or more responsible offerors will submit priced offers. **(804-1(b)(ii))** If only one offer is received contrary to expectations and price reasonableness cannot be determined by reference to a prior competition, contracting officers will be authorized to determine that the price competition was adequate based on these circumstances:

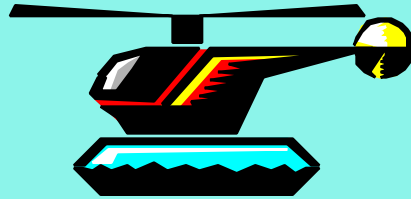
1. The offeror believed that at least one other offeror was capable of submitting a meaningful, responsive offer.
2. The offeror had no reason to believe that other potential offerors did not intend to submit an offer.
3. The determination is approved at a level above the contracting officer that the proposed price is based on adequate price competition and is reasonable.

So, in addition to what you have always been able to do with adequate price competition, the new rule adds greatest value and single offeror.

## Catalog or Market Price Exception Standards

### Elimination of SF 1412

- Relational formula
- Govt. end use request
- Most favored customer



Replaced with a clause  
Negotiating dynamics changed  
Information no longer predetermined

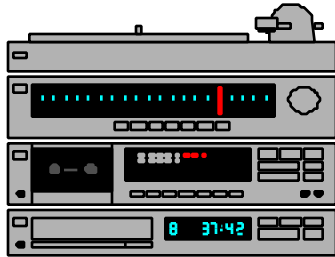
**(SF 1412)** Request for exemption from submission of cost or pricing data. The proposed rule attempted to modify this form to make it more “user friendly”. However, contractors fundamentally objected to the information required by the form as a condition of contracting, so the form was replaced by a clause. The effect is to change the negotiating dynamics and put the parties on a more equal footing. The information the contractor submits is no longer predetermined. Now, the contractor provides what he thinks supports the exception. Post-award audit rights are eliminated.

In addition, a relational formula is provided and can be used as a basis for determining whether there have been sufficient sales to the general public at the catalog price to warrant an exception.

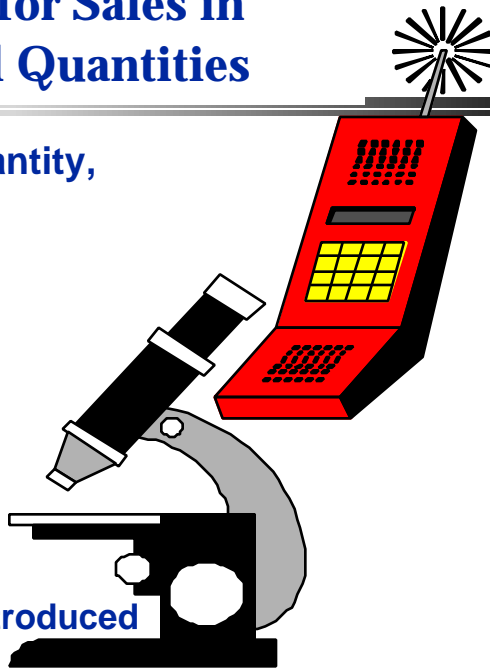
The requirement to account for **g**overnment end use and the requirement to disclose “most favored customer” prices is eliminated.

## Standards for Sales in Substantial Quantities

**More than a “nominal” quantity,  
no percentage test**



**Consider:  
Size of the market  
How recently the item was introduced**



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This exception has also undergone significant change with respect to the requirement that the items be “sold in substantial quantities to the general public.” The old rules required that the contractor pass a “percentage” test, i.e., sales to non-government end-users had to comprise at least 55 percent of total sales of the item. This test is now prohibited by law.

Under the new rules, an item is sold “in substantial quantities” if there are sales of “more than a nominal quantity based on the norm of the industry segment.” The contracting officer is advised to consider such factors as the size of the market and how recently the item was introduced in determining whether sales are substantial.

The general public consists of buyers other than the Government. When counting sales to the public, exclude sales to affiliates of offerors or FMS sales.



**(15.804-1(b)(2))** Established catalog prices are what the name implies, prices recorded in a catalog, price list or other regularly maintained verifiable record.

The new provision **(52.215-41)** requires offerors to submit the following for a catalog price exception:

- A copy or identification of the catalog and appropriate pages for the offered item.
- A copy of current discount policies and price list.
- Evidence of substantial sales to the general public, which is defined as buyers other than the Government.
- An explanation of the basis of each offered price and its relationship to the established catalog price.

Market prices are prices that are established in the course of ordinary trade between buyer and seller that can be substantiated from independent sources. Although some desired to change the “independent” nature of the source, the final rule has not changed this standard.

A request for market price exception must include:

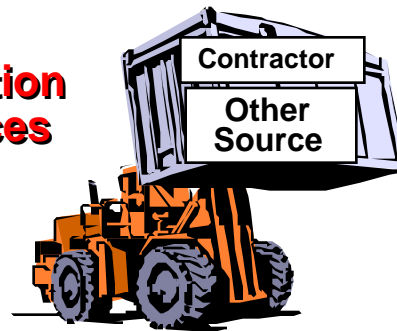
- Market price information, including the source and date of the market quotation or other basis for market price.
- A description of the nature of the market.
- Data supporting substantial sales to the general public.

## Commercial Item Exception



**Unable to Apply  
Other Exceptions**

**Obtain Information  
Regarding Prices  
from:**



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**(15.804-1(b))** For those items meeting the definition of a commercial item, there is a new exception available when the contracting officer does not have sufficient information to determine another exception applies. The contracting officer shall grant the commercial item exception if the contracting officer obtains information on prices for the same or similar items that have been sold in the commercial market to establish price reasonableness.

If the pricing information is adequate for establishing price reasonableness, an exception may be granted. Cost or pricing data and preparation of a written determination are only required if the pricing information is inadequate for performing a price analysis and determining reasonableness.

A new clause authorizes the Government to do a post-award audit of pricing information provided by the offeror for this exception but does not extend to cost or profit information or other data not relevant solely to the offeror's determination of the price to be offered. This right expires two years after date of award or the date of any modification to which it applies.

## Modifications of Contracts for Commercial Items

### Cost or Pricing data exempt if:

Original Contract excepted from  
Cost/Pricing data

Modification does not change  
nature of the Item

Modification does not add  
unrelated non-commercial work



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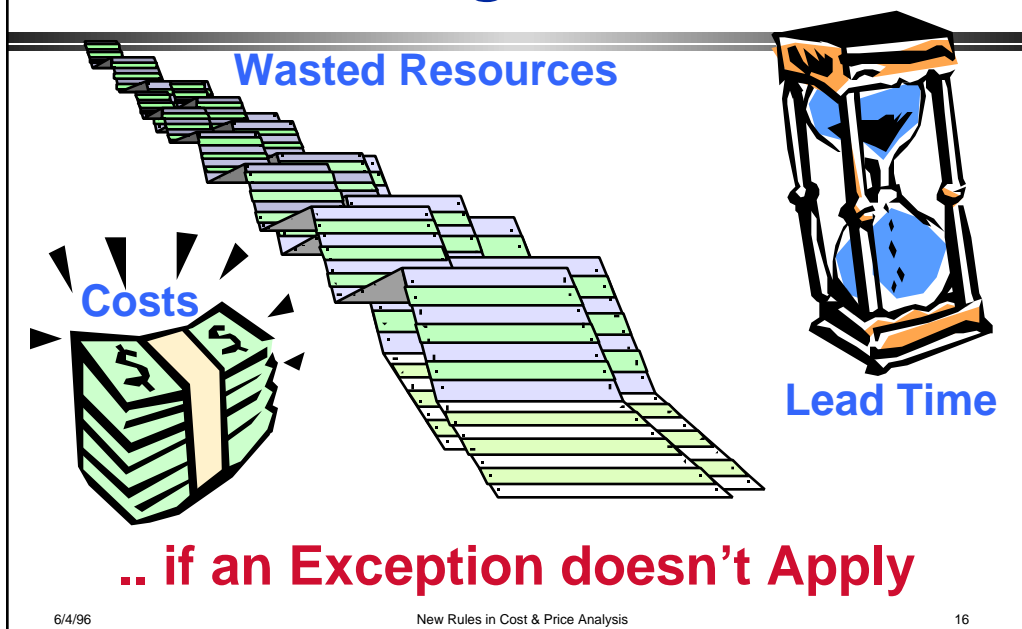
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Cost or pricing data and contract modifications.

**(15.804-1(b)(6))** The exception only applies when the original contract or subcontract was exempt from cost or pricing data. No cost or pricing data may be obtained for modifications unless the modification changes the contract from a commercial item contract to a contract for other than a commercial item. If the modification changes the nature of the work either by a change to the commercial item or by the addition of other non-commercial work, the contracting officer is not prohibited from obtaining cost or pricing data for the added work.

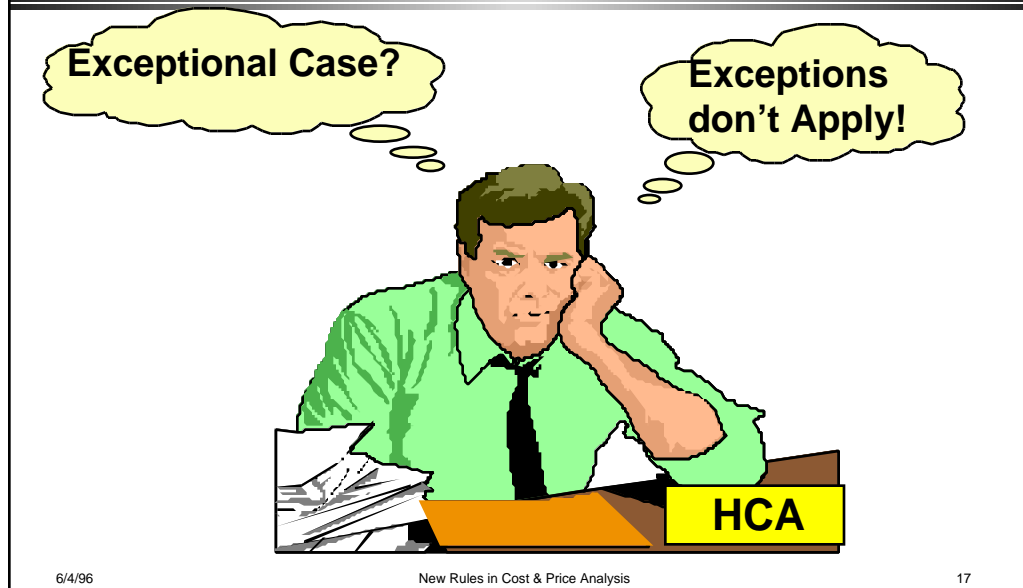
## FAR Encourages a Waiver..



**(15.804-1(b)(5))** Consider a waiver if exceptions do not apply and price reasonableness can be determined without resorting to cost or pricing data. FAR encourages the contracting officer to recommend a waiver. Why? Because reliance on cost or pricing data when it is unnecessary increases proposal costs, generally extends acquisition lead-time, and wastes both contractor and government resources.



# TINA Waiver Procedures



**(15.804-1(b)(5))** Before FASA, the HCA or agency head could delegate waiver authority. The TINA FAR case establishes the HCA as the waiver authority without power of delegation. It is true that waivers are granted only in exceptional cases; however, FAR encourages a broad interpretation of “exceptional”. For example, a waiver should be considered if an exception does not apply but the price can be determined to be fair and reasonable. The authorization and reasons for granting a waiver must be in writing.

If the HCA waives the submission of cost and pricing data, the contractor will be considered as having made available cost or pricing data. Therefore, any award to a subcontractor expected to exceed the threshold requires the submission of cost or pricing data unless an exception exists.

What is an “exceptional case”? For example, if cost or pricing data were furnished on previous production buys and the contracting officer determines such data is sufficient when combined with updated information, a waiver may be granted.

## **Actions Below the Threshold**

**Prices & quantities**

**Similar items**

**Previously sold**



**Price  
Reasonableness**



**Head of Contracting Agency  
may authorize cost or pricing data**

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### **(15.804-5(a)(4)) (Table 15-3(B))**

Even if an item is below the threshold, the contracting officer must still determine whether the price is fair and reasonable. In that determination, the contracting officer should first use information other than cost or pricing data. Such information should include, as a minimum, appropriate information on the prices and quantities at which the same or similar items have been sold previously. Cost information may also be required. For example, it might be necessary to support an analysis of material costs when sufficient information on labor and overhead is already available.

You must first “climb the mountain” to see if an exception applies. If no TINA exception applies, the HCA (without power of delegation) may authorize the contracting officer to obtain cost or pricing data below the threshold but above the SAT. The HCA will provide written justification that cost or pricing data are necessary to determine price reasonableness.

## Cost Realism



**Realistic?**  
**Clear Understanding?**  
**Consistent?**

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**(15.8010)** The definition of “cost realism analysis” found in DFARS was moved to the FAR. Cost realism means that costs in an offeror’s proposal are:

1. Realistic for the work to be performed.
2. Reflect a clear understanding of the requirements.
3. Are consistent with the offeror’s technical proposal.

Why does the Government care if an offer is realistic? An unrealistic price puts both the Government and contractor at risk. The risk to the Government is that it might select the wrong contractor under flexibly priced contracts. To cut its losses under a fixed price contract, the seller, might cut corners on product quality, deliver late or default which could force a time-consuming, costly reprocurement. They could also refuse to deal with the Government in the future or even be forced out of business.

An offered price may be low because the seller has made mistakes in estimating costs, has taken too many risks in estimating costs or is otherwise not responsible. On the other hand, a below-cost bid is not an indication of non-responsibility. A bidder may make a business decision to submit a below-cost bid; such a bid is not invalid.

The agency must perform a cost realism analysis whenever a cost reimbursement type contract is contemplated. Cost realism analysis should be performed anytime there is a concern about the relationship between the proposed cost and the technical proposal. The basis for the rule is that an offeror’s estimated costs may not provide valid indications of the costs that the Government is required to pay. This requirement exists whether or not an agency is required to request cost and pricing data.

## Cost or Pricing Data

**If the threshold is exceeded, no exception applies, and a waiver is not appropriate - must get cost or pricing data.**



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The Fundamental Statutory requirement remains.

**(15.804-5(c))** If after the receipt of offers, the contracting officer concludes that no exceptions apply and there is no basis for a waiver, then cost or pricing data must be obtained.

**(15.804-6(b))** Cost or pricing data shall be submitted on an SF1411, Contract Pricing Proposal Cover Sheet (Cost or Pricing Data Required). As the title implies, the SF1411 will be used only if cost or pricing data are required. Table 15-2 provides instructions for submission of a contract pricing proposal when cost or pricing data are required. The SF1411 provides a cover sheet for offerors to submit their pricing proposal .

## Requiring Cost or Pricing Data ...The Last Resort

**Submit cost or pricing data**  
**Certify in accordance with FAR**

**> \$500,000**

**Negotiated Contracts**  
**Subcontracts**  
**Modifications**



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The last resort, cost or pricing data.

**(15.804-2(a))** Cost or pricing data shall be obtained if the contracting officer concludes that none of the exceptions or a waiver apply. The threshold is \$500,000.

Cost or pricing data are required before accomplishing any of the following actions expected to exceed the threshold:

- The award of any negotiated contract.
- The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor have been required to furnish cost or price data.
- The modification of any contract or subcontract covered by the item above. Price adjustments shall consider both increases and decreases.

The contracting officer shall require the contractor or prospective contractor to submit:

- Cost or pricing data.
- A certificate of current cost or pricing data in a format specified by the FAR.

If cost or pricing data are submitted but an exception is later found to apply, the data shall not be considered cost or pricing data as defined and shall not be certified.

**(15.804-6(d))** The requirement is met if all data reasonably available to the offeror are submitted or identified by the time of agreement on price or another time agreed upon by the parties.

# Defective Cost or Pricing Data

**Before agreement on price**



**Cost data**

**After award:  
Price adjustment including  
Profit/Fee**



**Rule now applicable to all agencies**

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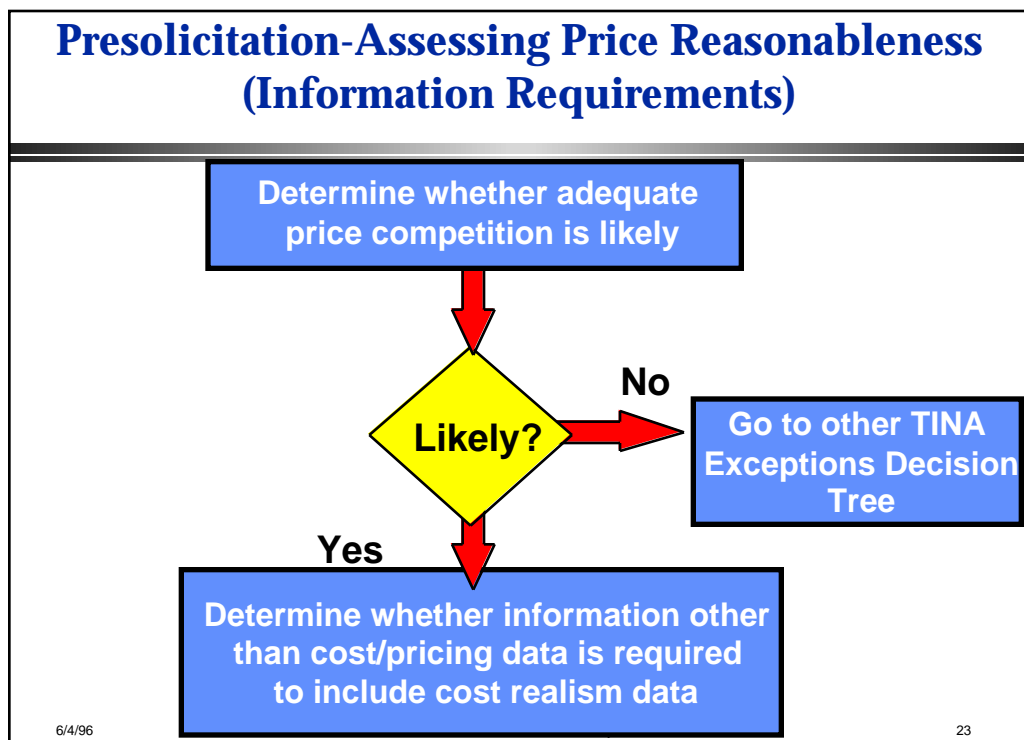
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Defective cost or pricing data is data that is inaccurate, incomplete, or non-current.

The change to the rules on defective cost or pricing data is to remove references to DoD and make it applicable to all agencies.

Now, before agreement on price, the contracting officer shall negotiate using any new data submitted or making allowance for the incorrect data. This should be reflected in any price negotiation memorandum.

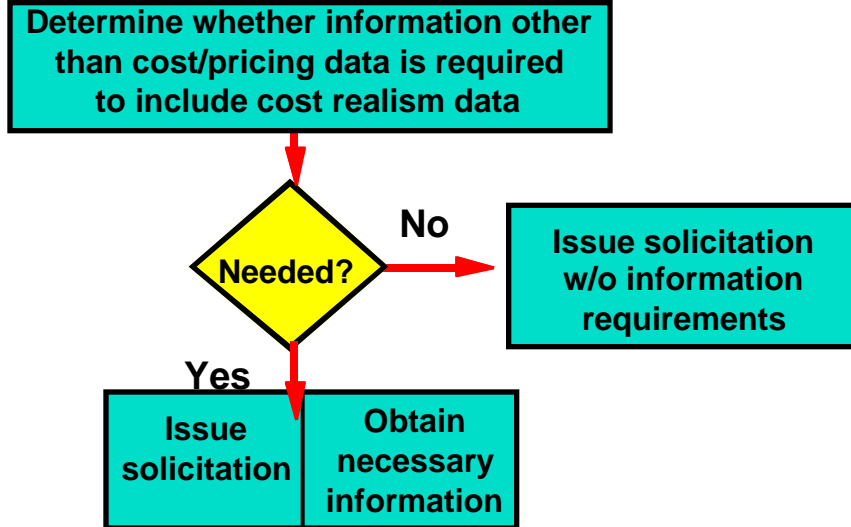
After the award, the Government is entitled to a price adjustment, including profit or fee of any significant amount by which the price was increased because of defective data.



Let us apply this information to a decision tree that assesses price reasonableness. The tree takes you through a logical progression of steps to determine whether cost or pricing data are required or whether exceptions to that requirement are met or if a waiver is appropriate. (You will find a copy of the entire decision tree as well as the “Other TINA Exceptions” decision tree following the lecture charts.)

Step one is to determine whether adequate price competition is likely. If you expect adequate price competition prior to soliciting, do not require cost or pricing data with proposals. If price competition is likely, the second step is to determine what, if any, data is required. If price competition is not likely, move to the other tree.

## Presolicitation-Assessing Price Reasonableness (Information Requirements)



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Is information other than cost or pricing data needed?

Generally, you should not need information from offerors to determine price reasonableness when an offeror qualifies for an exception based on adequate price competition.

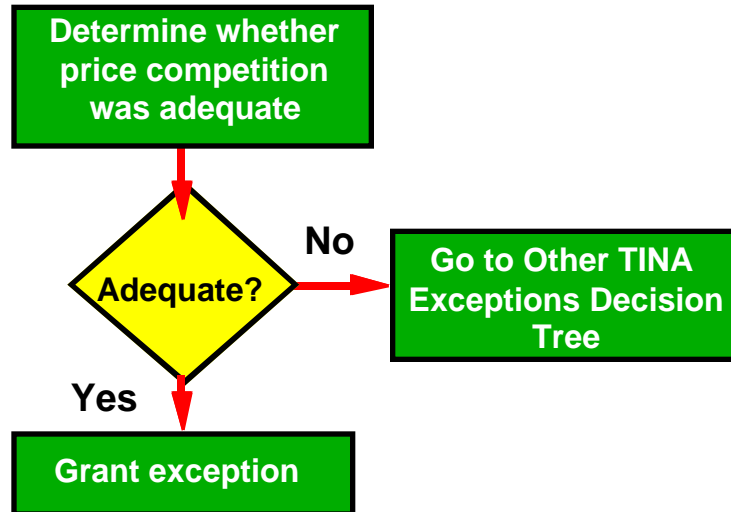
Cost realism data may be requested when it is necessary to ensure that offered prices are realistic. Cost realism helps determine the offeror's understanding of the work and the ability necessary to perform the contract.

On the other hand, below-cost offers are not necessarily unfair or an indication of non-responsibility. A bidder for various reasons, in its business judgment may decide to submit a below-cost bid. Such a bid is not invalid. Whether the awardee can perform the contract at the price offered is a matter of responsibility. The question is whether the contractor is willing, able and ready to satisfactorily perform at the offered price.

If data is needed, obtain it first from government sources, then other sources, and finally from the offeror. In the next step, determine whether price competition was adequate.



## Evaluation of Offers- Assessing Price Reasonableness



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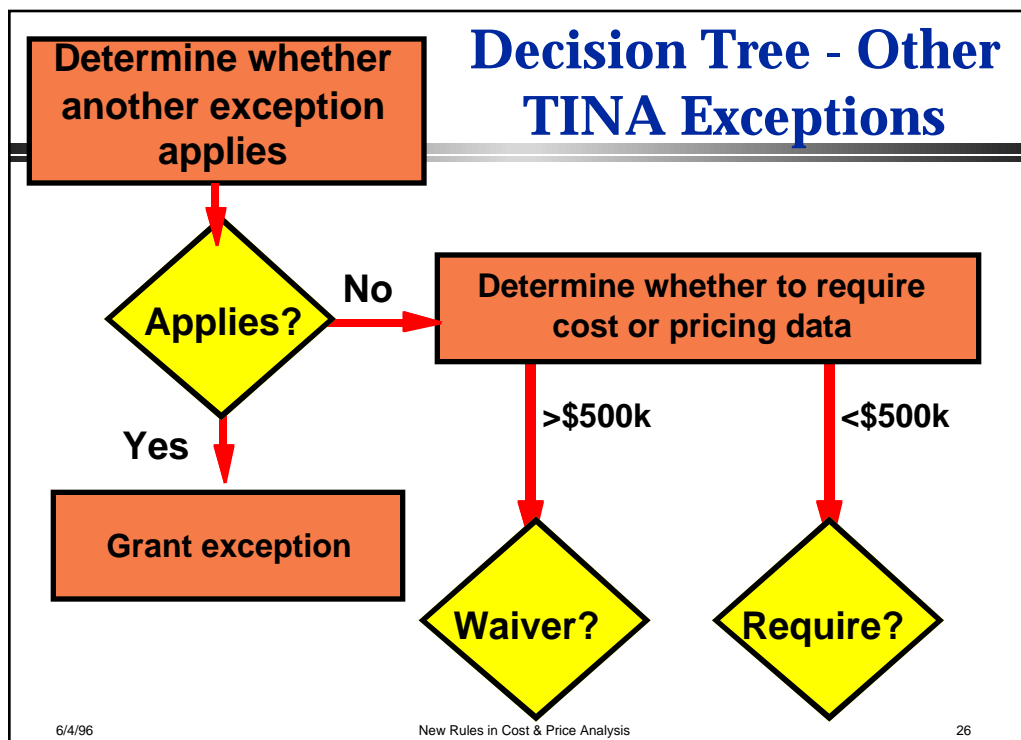
Was price competition adequate?

The FAR standard for adequacy is:

- The new single offeror scenario.
- Two or more responsible offerors, competing independently, submit priced offers responsive to the government requirement.
- In best value procurements, price must be a substantial factor.

However, price reasonableness remains the objective. Based on price analysis, the CO may find that the price is unreasonable. Remember the scenario where the CO has a reasonable expectation of adequate price competition but receives only one proposal. In this case, the contracting officer may still conclude that the offer qualifies for the exception.

Remember, by granting the exception, you have in effect determined that the price is fair and reasonable. If you cannot conclude that the price is fair and reasonable, then you do not have adequate price competition and must go to the other decision tree.

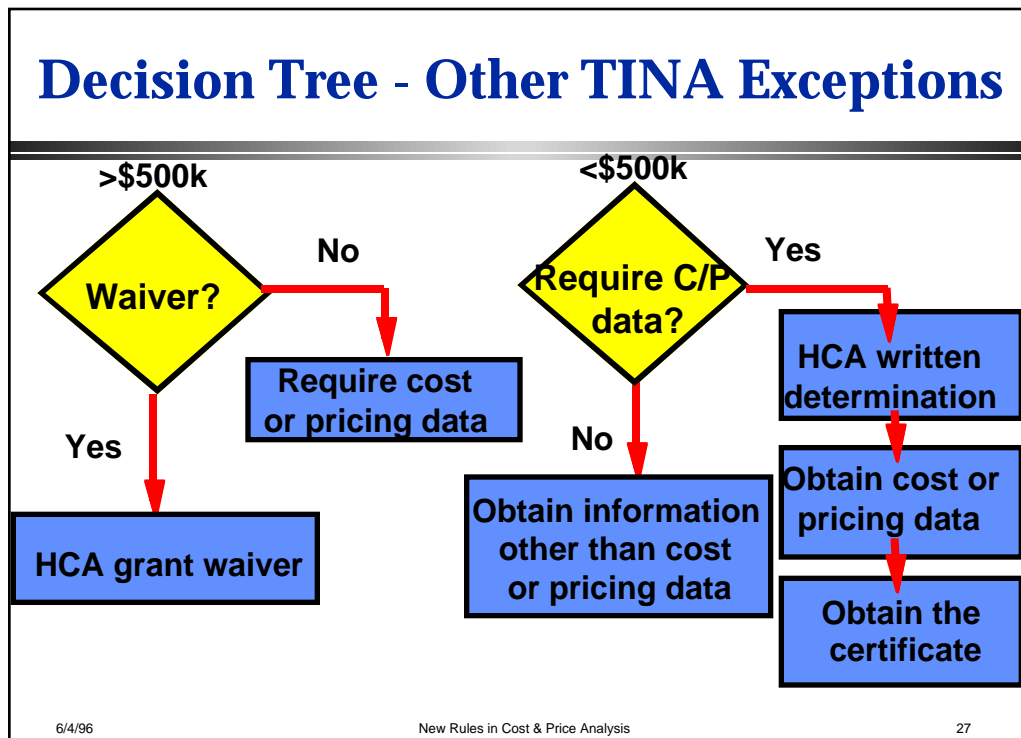


The second decision tree looks at cost or price decisions not dealing with adequate price competition. Even when no competition is expected, the FAR allows exceptions **(15.804-1(b)(4))** when:

- The agreed on price is based on established catalog or market price of commercial items sold in substantial quantities to the general public.
- Prices agreed upon are based on prices set by law or regulation.
- The Government is acquiring a commercial item and can determine price reasonableness based on past sales in the commercial market.

If an exception applies, grant the exception. If no exception applies, determine whether to require cost or pricing data. If the price will exceed the threshold, determine whether a waiver is appropriate.

If the expected price is below the threshold, determine whether to require cost or pricing data but remember that written approval is required from the head of the contracting activity.



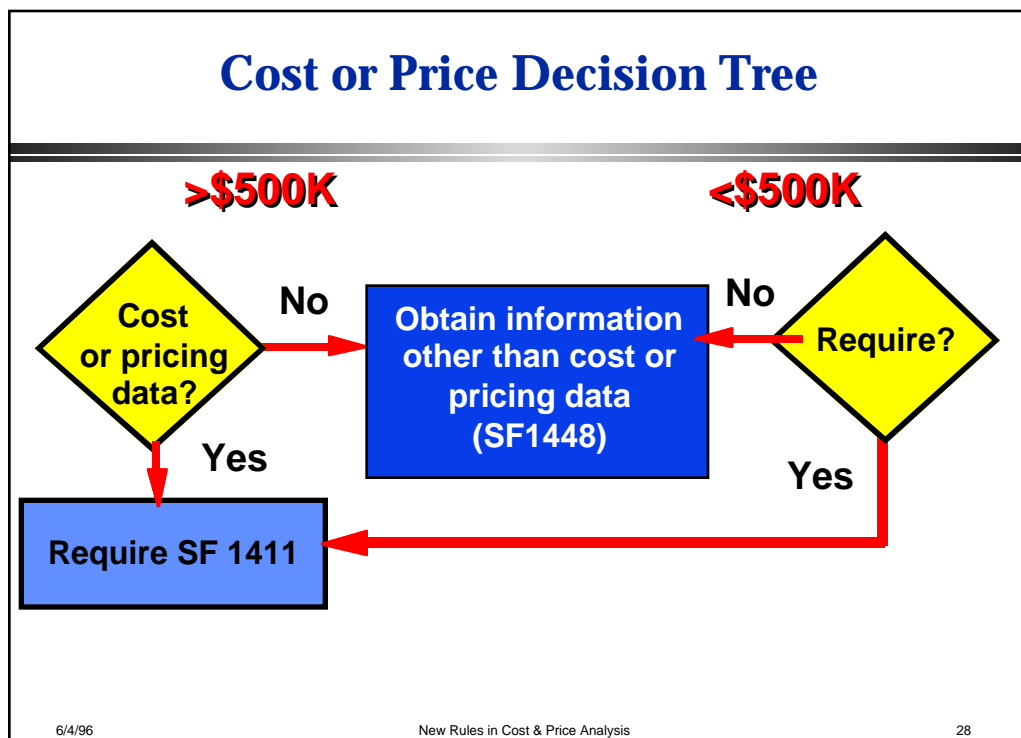
Above the threshold, if a waiver is appropriate, it must be granted by the HCA. Remember that a waiver is encouraged in those cases where you can determine the price is reasonable but cannot apply an exception. If a waiver is not appropriate, require cost or pricing data.

Below the threshold, the decision process is somewhat different. The HCA must first make a written determination that cost or pricing data are needed to determine price reasonableness before it can be obtained.

If cost or pricing data are not required, obtain information other than cost or pricing data.

If you determine cost or pricing data are required, notify the offeror to submit the data. Then, at the time of agreement on price or another time agreed upon by the parties, obtain the Certificate of Current Cost or Pricing Data provided in the FAR.

Remember, if the contracting officer determines an exception exists after the closing date for proposals, any information furnished by the offeror shall no longer be considered cost or pricing data for purposes of certification or defective pricing. We've just walked through the process to determine price reasonableness. There is one issue to look at more closely.



This is a “stand-alone chart” on obtaining data. Regardless of the expected dollar value, do NOT automatically require offerors to furnish cost or pricing data OR a request for an exception. Remember that cost or pricing data are the last resort!

However, if you decide you need cost or pricing data, obtain it by using an SF1411. This is the only purpose of this form.

If you conclude that you can price the contract with information other than cost or pricing data, use the SF1448 or the contractor’s direct submission, whichever you prefer.

# Summary

*Emphasize fair & reasonable prices*

*Commercial practices*

*Eliminate SF1412 and associated data requirements*

*Information other than C/P data instead of C/P data*

*Encourage waiver if price otherwise reasonable*



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The TINA rule is built on the fundamental objective that contracting officers must determine if the contract price is fair and reasonable. To do this they must:

- Follow commercial practices.
- Price contracts using techniques other than cost or pricing data.

The rule is meant to empower contracting officers.

Flexibility was built into the rule and the objective was to give contracting officers the ability to obtain information to get fair and reasonable prices without the baggage associated with cost or pricing data; e.g., certifications and defective pricing.

The new TINA rule changes the focus from “after the fact” to doing the job right up front. This ends the briefing on new rules in cost and price analysis. What are your questions?

## **New Rules in Cost & Price Analysis - Practical Exercise**

**The practical exercise lasts 2-1/2 hours.**

**In a group setting, participants assume the role of a contracting officer.**

**Given several situations, test each scenario to determine whether an exception applies, a waiver may be justified, or cost and price data are required.**

**Groups will brief (and defend!) their exercise solutions in plenary session.**

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The purpose of this exercise is to reinforce the new rules in cost and price analysis we have just discussed by applying them to determine whether exceptions apply, waivers are appropriate, or cost or pricing data must be obtained.

You will have 2-1/2 hours for this exercise which includes a 30 minute briefing session at the end. I suggest you allocate your time as follows:

Spend 5-10 minutes by yourself on each of the eight tasks reading the scenario and formulating your answer. Plan on an additional five minutes each to discuss issues within your group and reach a consensus.

## New Rules in Cost & Price Analysis - Practical Exercise

### TINA Briefing Chart

Task #

Work Group \_\_\_\_

0001

0002

0003

0004

6/4/96

New Rules in Cost & Price Analysis

31

This is the template you will use to record your solutions. It is found at the end of the exercise.

Your response should identify a TINA exception, make a case for a waiver or require cost or pricing data. You may make some assumptions, but do not make an assumption which alone would drive you to an answer. Also, consider whether a cost realism analysis is required.